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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. A-53

RONALD HENDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
The Government's Case	3
The Defense	11
Point I—There was insufficient proof to establish a conspiracy	14
Point II—Absent proof of a conspiracy the acts and declarations of James Hines were inadmissible in evidence, and the substantive count must be reversed	21
Conclusion	21

CITATIONS

Bell v. United States, 2 F. 2d 543 (8th Cir. 19)	16
Blumenthal v. United States, 332 U.S. 539 (1946)	17
Burkhardt v. United States, 13 F. 2d 841 (6th Cir. 19)	16
Dickenson v. United States, 18 F. 2d 887 (8th Cir. 19)	16
Dodson v. United States, 215 F. 2d 196 (6th Cir. 1954)	20
Fisher v. United States, 266 F. 667 (4th Cir. 1920)	14

PAGE

Hansen v. Huff, 291 U.S. 559 (1964) 14

Johnson v. United States, 215 F. 679 (7th Cir. 1917) 15

Kotteakos v. United States, 328 U.S. 750 (1946) 17

Linde v. United States, 12 F. 2d 59 (8th Cir. 1926) 16

Mortenson v. United States, 322 U.S. 369 20

Stubbs v. United States, 349 F. 571 (9th Cir. 19) 16

Thorn v. United States, 278 F. 932 (8th Cir. 1922) 19

United States v. Borelli, 336 F. 2d 376 (2d Cir. 1964) 18
United States v. Falcone, 109 F. 2d 579 (2d Cir. 1940) 18, 20
United States v. Heitler, 274 F. 401 (D.C. Cir. 1921) 16
United States v. Koch, 113 F. 2d 982 (2d Cir. 1940) 16
United States v. Pape, 144 F. 2d 778 (2d Cir. 1944) 14
United States v. Ross, 257 F. 2d 292 (2d Cir. 1958) 20
United States v. Vacelli, 407 F. 2d 735 (7th Cir. 1969) 16
United States v. Webb, 359 F. 2d 558 (6th Cir. 1966) 18

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The petitioner Ronald Henderson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 11, 1971.

Opinion Below

No opinion was rendered by the United States Court of Appeals for the Second Circuit. The opinion of the United States District Court for the Southern District of New York, delivered in rendering the verdict in this case, is contained in the appendix on appeal.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 11, 1971. A timely application for an extension of time in which to file the petition for certiorari was made on July 9, 1971 and this petition for certiorari was filed within 30 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether sufficient proof of a conspiracy was presented under the decisions of the Court in *Kotteakos* v. *United States,* 328 U.S. 750 and *Blumenthal* v. *United States,* 332 U.S. 539, and has the conspiracy concept been unduly extended beyond reasonable bounds so as to become a prosecutorial tool.

Statement of the Case

The petitioner, Ronald Henderson, was convicted in the United States District Court for the Southern District of New York (Weinfeld, J.) on July 14, 1970 of knowingly transporting in interstate commerce, a woman for the purpose of prostitution and debauchery (Title 18, U.S.C. §2421) and of a conspiracy to violate the so called Mann Act (Title 18, U.S.C. §371). He was sentenced to concurrent terms of two years. The conviction was affirmed without opinion by the United States Court of Appeals for the Second Circuit on June 11, 1971.

Petitioner is presently in prison.

The Government's Case

Joyce Tiedens, 17-year-old on June 29, 1969, was unmarried, but pregnant, and resided in Minneapolis, Minnesota with her mother, five brothers and sisters (R. 12-14).

Christie Lee Saf, 17½ years old on June 29, 1969, a waitress, lived with foster parents in St. Paul, Minnesota. The two girls were close friends, having shared two years together at the Good Shepard, a home for problem girls (Tiedens, R. 59; Saf, R. 178-9).

On June 29, 1969, Joyce and Christie were at a party celebrating Joyce's 17th birthday. They left the party with boy friends who left them at a bus stop on Hennapin Avenue in Minneapolis. It was early evening, and both girls, having imbibed wine, were somewhat "high" (Tiedens, R. 14, 43, 45-6; Saf, R. 139-40, 170). While waiting, the girls began conversing with a man named Charles, who was soon joined by two other men, James* and Ronald. Ronald is the defendant, Henderson. They exchanged introductions, and after innocuous conversation, the three men invited the two girls to accompany them back to their motel, the Holiday Inn, for drinks or coffee. The girls accepted, and the five took a taxicab to the hotel (Tiedens, R. 14-16; Saf, R. 140, 144, 172).

The group went to Charles' room, had coffee, and talked. Charles asked Joyce if she wanted to go to New York, and she said no (Tiedens, R. 17). She did say that she wanted to leave Minneapolis, and the group talked about New York

* James was indicted as a codefendant under the name B. Bernard a/k/a James Hines etc., but his case was severed before trial (R. 2).

and "how big New York was *and how different* it was" (Tiedens, R. 63, 74; Saf, R. 141-2). Christie asked "right out" whether the men were pimps, and one of the men, it was not remembered which one, answered yes. Christie told them that she "didn't like their occupations. I didn't think it was a very good job" (Tiedens, R. 18, 76; Saf, R. 141, 175). When Charles noticed that Joyce was paying more attention to the appellant than to him, he became angry, and the two girls, James and Henderson then retired to the appellant's room (Tiedens, R. 17-18). There they talked and Joyce admired a diamond ring and watch that the appellant was wearing, and also looked through his wallet, noticing about $4,000.00 (Tiedens, R. 19).

James and Christie then went to James' room. Christie told him that she had been in the Good Shepard home for truancy and incorrigibility, and that her mother was an alcoholic. They also talked about New York, James mentioning that if Christie wanted to go there, she could go with him. However, he did not ask her to go. No one asked her to go to New York (Saf, R. 145-6, 178-181, 211).

Joyce, meanwhile, remained in the appellant's room where they talked for a while, then had sexual intercourse (Tiedens, R. 20).

When Christie and James returned, the two girls left the hotel, the men giving them cab fare. Ronald and James also gave the girls their phone numbers in New York, suggesting they could call if they ever were in New York (Saf, R. 144-6, 184, 210). Henderson asked Joyce if she wanted to go to New York, and although she said "yes," she "wasn't planning to." Christie said no—(Tiedens,

R. 20). Leaving the hotel, the girls spent the night together in a house which Joyce's mother had just vacated (Tiedens, R. 20; Saf, R. 146).

The next day the girls went to the house which Joyce's mother was not occupying. Joyce's father, though divorced, was there to visit the children, and Joyce and her father had an argument. The father complained that he didn't like the fact that Joyce, who often "hung out" in black areas (Tiedens, R. 75-6), had black boyfriends. The father threatened to have her boy friend put in jail, and threatened to hit the girl with the hammer or wrench he was then brandishing. Her father had previously beaten her on occasion, and at the time of trial was in jail for assaulting Joyce's mother and for alcoholism (Tiedens, R. 80, 87, 98, 134-6; Saf, R. 146-7, 186-7). Joyce was "mad," and she was crying, and "hated my father." She "wanted to leave Minneapolis." She didn't care where she went as long as it was out of Minneapolis, and decided "as long as I got the invitation, I was going to see if I could go the New York" (Tiedens, R. 21, 87, 98; Saf, R. 190). Joyce and Christie left the house, Joyce telling her mother she was leaving and going to Spokane, Washington, and her mother "told me to be back in about an hour" (Tiedens, R. 92).

Joyce took with her only a cosmetic kit, and no change of clothes (Tiedens, R. 88-9). Since she had been trained as a clerk-typist, she hoped to get an office job in New York. In fact she had obtained a job in Minneapolis as a clerk-typist through an agency, The American Girl, and planned to go to the agency's office in New York (Tiedens, R. 90-3, 127-8). She thought Christie was going to New York with

her, because Christie didn't want Joyce to go by herself, but Christie decided to go because "I was sick of everything" (R. 96; Saf, R. 147, 188). Joyce did not believe that if she went with the appellant, he would turn her into a prostitute, and that was not the reason she went (Tiedens, R. 99-100).

The girls then returned to the Holiday Inn, and went to Henderson's room, asking him to take them to New York. The appellant "looked surprised because we had come back," but after Joyce told him about her family problems, he offered to take care of them. James came in and they decided to leave that day (Tiedens, R. 21-2, 93, 99; Saf, R. 147). Joyce had with her $1, and Christie less than $10, but Henderson said he would help Joyce get a job as a typist in New York, and that they should not worry about money since he would help them (Tiedens, R. 22-3, 93, 98; Saf, R. 198).

The four took a taxi to the airport, talking along the way about what a big city New York was, and Henderson gave Joyce $70.00 for a plane ticket, while James gave $60.00 to Christie, who also used part of her own money for the fare. Since the girls said they were worried about being traced by their parents, Henderson suggested they change their names and ages, and Joyce assumed the name of a girl friend and assigned another girl friend's name to Christie. Joyce also changed her age to 19 (Tiedens, 23-4; Saf, R. 148-9, 192). They then boarded the plane, the two men sitting in first class, and the two girls in coach (Tiedens, R. 24; Saf, R. 151). During the flight, James joined Christie in the rear, while Joyce went up to talk to Henderson in first class. Joyce asked Henderson whether

she could go home or call her father, but Roland told her that she could not do either until she was twenty-two (Tiedens, R. 105). James told Christie that she would not like New York or what she was doing at first, but he would find her a place to stay and a job (Saf, R. 151).

When the plane stopped in Chicago, for a lengthy layover, the four went to the apartment of a relative of Henderson's. There, after Henderson and James left for a while, Christie asked to use the telephone to call her foster parents. The person in the apartment, however, refused, but added that she could telegraph, and suggested she wait until she reached New York (Tiedens, R. 25-6; Saf, R. 152-3).

Reboarding the plane for the flight to New York, the couples had further conversations. Henderson asked Joyce whether she would "do anything for him," like being a bank robber or a prostitute or a belly dancer or whatever." Joyce said no (Tiedens, R. 26, 133-4).

Arriving in New York, the four took a cab to the apartment of a girl named Connie, where Henderson and Joyce went upstairs, while James and Christie took a cab elsewhere. This was the last time the two girls were together (Tiedens, R. 27).

In the apartment, Henderson woke up Connie and asked her where "the thing was," and she replied "behind the picture." Henderson lifted up the picture on the wall, and money fell down (Tiedens, R. 28). Fifteen or twenty minutes later, Henderson and Joyce left and went to the apartment of a girl named Dee Dee. Dee Dee was also asleep,

and Henderson woke her up and introduced her to Joyce. Dee Dee "was very nice to me" and offered to answer any questions Joyce might have. Henderson came out of Dee Dee's room with "a lot of money" (Tiedens, R. 28, 114). Dee Dee asked the appellant whether Joyce was "to go to work tonight," and Henderson replied, "I don't know yet" (Tiedens, R. 29). Joyce thought that they were talking about prostitution (R. 136-7). The appellant and Joyce then left and went to the Village where Henderson bought Joyce clothes "because I didn't have any other clothes" (Tiedens, R. 29-31, 123). They returned to Connie's apartment and then went to the Markwell Hotel where the appellant registered for a room in his name. There they made love, and the appellant offered to buy Joyce birth control pills, new shoes and wigs. The appellant then left, and Joyce went to sleep (Tiedens, R. 31-33, 123-4).

When Christie and James left Joyce and Ronald, they went to the apartment of a girl who introduced herself as Linda from Memphis. Linda told Christie that she liked New York and what she was doing, and added that Christie probably would not like it at first. Linda did not discuss what she was doing, but Christie "just guessed" it was prostitution, although no one had said anything about prostitution to her or Joyce, or that she was coming to New York to be a prostitute (Saf, R. 154-5, 203-4). Soon Linda left to go to the hairdresser and James went to the laundry. When he returned, he said that he could tell that Christie was scared, and she replied that she wanted to go back, she didn't like it. James grabbed her and said she was staying, he wasn't going to let her go, and she would get used to the city. He said he could take care of her,

and added that Christie would not have to have sexual intercourse with anyone but him if she did not want to. James also said he would buy her clothes, since she didn't have any, and would find her a place to stay (Saf, R. 155-6).

The couples left and James bought her clothes and then they returned to the apartment and arranged for a room at the Woodstock Hotel. James stayed in the apartment and gave Christie his phone number, while Linda, who had also returned, was asked to take Christie to the hotel (Saf, R. 156-60). James told Linda to tell Christie what to do so she would not "get picked up right away." In the cab to the hotel Linda told Christie how to tell the difference between a customer and a policeman. If the man approached the girl, he was probably a policeman. So Christie was advised to approach the man. Linda also told her that since she was white, she should not accept anything under $25.00, and the further the customer wanted to go, the more money she should try to get. If they went to a hotel, Christie and the customer should register separately and then go upstairs. Linda also gave Christie names of hotels she could use, the Woodstock Hotel being on the list—(Saf, R. 160-1).

Arriving at the hotel, Christie paid with money that James had given her, and went to her room alone. Since Christie had decided that New York "might not be too bad of a place to visit, but I'd never stay," she telephoned her foster parents. She, then, called the police who came and took her to the police station. There she telephoned Henderson in the presence of FBI agent McShane and found out where Joyce was (Saf, R. 162-4, 206).

During her conversations with James, he had never discussed the appellant with her, nor was Christie told or was it indicated to her that James and Henderson were working together (R. 204).

James T. McShane, a special agent in the FBI, testified that on July 1, 1969 he received a call from the New York police and went to a precinct where he met and talked with Christie Saf. The girl made a phone call, and McShane went to the Markwell Hotel on West 45th Street (R. 215-18). He noted that room 809 was registered to Ronald Henderson, and went to the room and spoke with Joyce Tiedens (R. 218). During the conversation, Henderson began to enter the room, then slammed the door and ran down the stairs. He was apprehended by a city detective who had accompanied McShane to the hotel (R. 219).

At the police precinct, McShane warned Henderson of his rights, and questioned him. The appellant told the agent that he was the son of Mr. and Mrs. Henderson of St. Louis, but was living in New York. Henderson stated that he had been in Minneapolis with friends, Bernard and Charles Morris. He said that while on the street they had met two girls who were drunk, and who told them that they obtained money by rolling drunks. When they heard that the men were from New York, they said they wanted to go there. Henderson said that he told the girls he would find them a hotel in New York if they came. However, there was no mention of prostitution. The appellant admitted having sexual intercourse with Joyce Tiedens in Minneapolis and New York City. He also said that Joyce had her own money (R. 221-5).

The Defense

Ronald Henderson, the defendant, testified that he is 26 years old and was convicted of petit larceny, forgery and receiving stolen goods in 1965-6 (R. 235-6).

On June 29, 1969, he was in Minneapolis on a trip "to get out of the city for a while" since it was very hot in New York that summer (R. 254). He made the trip with Charles Morris and James Hines, Hines being a friend from shooting pool together (R. 236, 259). They planned to stay in Minneapolis for three or four days, and resided there at the Holiday Inn (R. 236).

Henderson and his friends met Joyce Tiedens and Christie Lee Saf on the street. The girls were drunk and said they were celebrating Joyce's nineteenth birthday. The girls agreed to accompany the men to their hotel and went with Charles and James to Charles' room, Henderson going to his room alone (R. 237, 239). After a while, the two girls and James came to Henderson's room. When they entered, the girls asked him if he was a pimp, too, and he replied, "No, I'm a man." (R. 237, 252). The defendant talked to Joyce who told him about her trouble with her father and her background (R. 240-1). They had sexual intercourse (R. 241). Though Joyce said she was going to leave home, mentioning in particular Colorado, the defendant did not suggest bringing her to New York, though he offered to help her (R. 241-2). When Christie came back into the room she said she wanted to go to New York, but had not done so because she did not want to break up with Joyce, her close friend (R. 242). Hender-

son gave Joyce his telephone number and mentioned that the employment agency, The American Girl, which Joyce had used in Minneapolis to find a job, also had an office in New York (R. 242-3). The girls then left, and the defendant did not expect them to come back (R. 243-4).

The next day, however, the girls returned, Joyce announcing "we're going to New York." Henderson was surprised, and replied, "good, if that's what you want to do" (R. 244-5). Joyce said she did not have any money and asked for help, explaining that she was leaving to get away from her father (R. 245). The defendant gave her some money (R. 245). Joyce also mentioned that she hoped her parents would not "find out," and Henderson suggested she could just change her name on the airline ticket, and Joyce agreed (R. 235-6).

On the airplane they talked about planes, since Joyce had never been on one before. The defendant never asked her if she would be a bank robber, prostitute or belly dancer for him—(R. 246-7).

In New York, Henderson took Joyce to the house of a friend, Connie, and then went to get a room. Since the room at the Markwell Hotel wouldn't be ready for a while, he took Joyce to the Village to buy her clothes because she didn't have a change of clothes with her (R. 248-9). They then went to the hotel where Henderson registered in his own name since he was paying (R. 249). Then they made love. He told Joyce he would buy her birth control pills because she expressed a fear of pregnancy (R. 249, 253). He then left.

When he returned three hours later, he saw a man in Joyce's room, and when someone yelled "there he is," Henderson ran because he was "leery" and didn't know what was happening (R. 250-1). Taken to the police station, he was told he was held for rape and assault on a 15 year old girl. Henderson asked for a lawyer, and was told he could have one "after a while" (R. 250-1).

In the past, the defendant has used various aliases, including Anthony Strong, and Ronald Ingram. The alias he uses most frequently, however, is Ronald Henderson. His real name is Ronnie Farr Vaughn (R. 257-8). He stated that he ghost writes lyrics for a singer and writer named Isaac Hayes who works for Stax Recording in Memphis. Hayes also owns the apartment in New York which the appellant inhabits (R. 262-8). The money in the apartment of Connie, whose last name is Henderson, was money the defendant left there before his trip. It was $200.00 and he got it for writing lyrics. Connie is a girl friend, as is Dee Dee Ingram. He did not get money from Dee Dee (R. 268-71).

The defendant swore that he never told or indicated to the girls that he expected them to become prostitutes, and never instructed them about it (R. 252-3). The purpose of bringing Joyce to New York was "to help her" as she requested, and he was not in Minneapolis to procure women for prostitution in New York (R. 253).

Ronald Henderson, a lance corporal in the Marines, testified that he is the son of Claude Henderson of East St. Louis, and never saw the defendant before (R. 280-1).

POINT I

There was insufficient proof to establish a conspiracy.

The Petitioner, though indicted with another, was tried alone, and convicted of transporting women across interstate lines with intent to lure them into prostitution, and conspiracy to commit that crime. He was found not guilty of enticing the women into interstate commerce with the same purpose. The evidence directly implicating Henderson alone was meager. He did not entice the girls to come to New York. The decision to accompany him and James Hines was made by the girls for personal reasons because of family problems, and they left Minneapolis with no intent to engage in prostitution. Upon arriving in New York, Joyce Tiedens, the girl with the petitioner, was introduced to two of Henderson's girl friends, had clothes bought for her, and was lodged in a hotel. She did have sexual intercourse with Henderson, as she had in Minneapolis, but since this was clearly not the purpose of the journey, the statute was not thereby violated. For where solely intercourse is involved, the transportation must have this for its object or be the means of effecting it. A trip for another purpose, even though sexual intercourse be contemplated, removes the act from the statutory prohibition [*Hansen* v. *Huff*, 291 U.S. 559, 563 (1934); *Fisher* v. *United States*, 266 F 667 (4th Cir. 1920); *United States* v. *Pape*, 144 F2d 778 (2d Cir. 1944)]. Here, of course, the petitioner's purpose was to return home, while the girl wanted to come to New York to get away from her parents and find a job.

The only mention of prostitution between the petitioner and his girl occurred on the airplane trip to New York, where the defendant asked Joyce whether she would be willing to do anything for him, mentioning as examples, bank robbery, prostitution or belly dancing. Obviously, this casual remark can hardly be convincing proof of an intent to entice the girl into prostitution. Other events may have been suggestive or suspicious, but that is insufficient to convict. For instance, in *Johnson* v. *United States*, 215 F. 679 (7th Cir. 1917), a girl in financial straits telephoned the defendant from Pittsburgh, and was wired $75.00 and instructions to meet the defendant in Chicago. The girl was a prostitute, and the defendant had met her in a brothel and had previously taken her along his journeys throughout the country. After her arrival in Chicago the defendant gave her money which she used to open up a brothel there. The Circuit Court held that the evidence was insufficient to allow conviction for transporting the girl across state lines for purposes of prostitution. Certainly, the evidence in the present case is far less convincing.

The government, however sought to overcome the deficiency in proof by charging a conspiracy, and introducing at Henderson's trial evidence relating to the intent of his companion, James Hines. For it is evident that Hines had prostitution in mind for Christie Lee Saf, as the instructions given by the girl Linda to Christie made clear. Thus, the evidence of Hines' intent is the core of the government's case against Henderson, not only as proof of Henderson's intent on the substantive count, but also as proof that Henderson had entered into a conspiracy to transport girls into prostitution.

However, even if Henderson was engaged in the same substantive offense as Hines, proof that they were doing the same thing is not proof of a conspiracy. For proof that two people commit similar substantive crimes does not prove that they did it by agreement. In *Linde* v. *United States,* 13 F.2d 59 (8th Cir. 1926) there was a conspiracy to transport stolen automobiles across interstate lines. Two of the defendants who received the stolen cars were found not guilty of conspiracy, the court writing:

> "That they may have had guilty knowledge and participation rests upon suspicion only, arising from their acquaintance and association with some or all of the other conspirators; but to establish a conspiracy to violate a criminal statute the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement."

to the same effect, *United States* v. *Heitler,* 274 F. 401 (D.C. Cir. 1921); *Stubbs* v. *United States,* 249 F. 571 (9th Cir. 19); *Bell* v. *United States,* 2 F. 2d 543 (8th Cir. 19); *Dickenson* v. *United States,* 18 F. 2d 887 (8th Cir. 19); *Burkhardt* v. *United States,* 13 F. 2d 841 (6th Cir. 19); *United States* v. *Koch,* 113 F. 2d Cir. 1940). Similar objectives, thus, do not prove conspiracy. In *United States* v. *Vacelli,* 407 F2d 735 (7th Cir. 1969) some of the conspirators who agreed to hijack silverware also hijacked polaroid equipment. The court decided that "the fact that the object in both the polaroid hijacking and the silver hijacking were similar is insufficient to constitute an overall common conspiracy: (*id.* at 744). In the same way as two conspiracies, including in them common members of both, can operate individually, individuals can operate with the same

object without forming a conspiracy to do so. Thus, in *Kotteakos* v. *United States,* 328 U.S. 750 (1946) the Supreme Court found individual enterprises existing where many people and groups of people each intended to obtain FHA loans on false applications, all the defendants using the same broker to prepare the loan applications. In amplifying the *Kotteakos* holding in *Blumenthal* v. *United States* [332 U.S. 539 (1946)] the Supreme Court stated:

> "No two of those agreements were tied together as stages in the larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct illegal end. Each loan was an end in itself, separate from all others although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way by agreement or otherwise in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of the agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single over-all comprehensive plan."

The holding of *Kotteakos* is thus directly applicable to the present case. There was no showing that Henderson and Hines were other than two individual entrepreneurs, each separately engaged in the same enterprise. Neither appeared interested in whether the other was successful or not. Each paid separately for his own girl. Each paired off with one of the girls alone in the hotel room. Each escorted a single girl. Moreover, when they arrived in

New York, they immediately separated. Hines introduced his girl to his own girl friend, Henderson introduced Joyce to his own girls. There was no aid or agreement of Hines in procuring Christie for Hines. Thus, there was no evidence that each did what a conspirator must do, as Learned Hand wrote. He "must in some sense promote their venture himself, make it his own, have a stake in its outcome" [*United States* v. *Falcone,* 109 F 2d 579, 581 (2d Cir. 1940)]. It is apparent here that Henderson had no stake in Hines success or failure with Christie, nor did Hines have any stake or concern in Henderson's venture. Consequently, Henderson and Hines acted as individual entrepreneurs, the proof failing to show that their actions were more than distint and separate crimes with the same object. In other words, it failed to show a combination or agreement as the essential element of a conspiracy [*United States* v. *Borelli,* 336 F. 2d 376 (2d Cir. 1964)]. And to convict this element must be shown beyond a reasonable doubt [*United States* v. *Webb,* 359 F. 2d 558 (6th Cir. 1966)].

Moreover, on a factual plane, the actions of Hines with Christie were not entirely the same as Henderson with Joyce. Certainly, there was some duplication. Each purchased clothes for his girl and found her a hotel room. But this is explainable by the circumstance that neither girl had brought clothes with her, nor had they a place to stay. Importantly, however, there is a crucial difference in the acts of each, for Hines, in introducing Christie to Linda, had her instructed on the elements of prostitution before she took up residence at the hotel. Indeed, it is quite likely that Christie called her parents and the police because she knew what Hines had in mind. However,

though Henderson introduced Joyce to two girl friends, significantly none of these proported prostitutes ever instructed Joyce about prostitution nor did Henderson ever ask them to, in complete contrast to Hines. It thus may well be asked why, if Henderson and Hines had agreed to lead the girls into prostitution, did the petitioner not attempt to do so in the same manner as Hines did. For certainly, he had the same opportunity, having introduced Joyce to two girl friends in their time in New York. One answer, of course, is that Henderson did not intend to make Joyce into a prostitute, but rather decided to keep her as a girl friend, a non-criminal act [*Thorn* v. *United States*, 278 F. 932 (8th Cir. 1922)]. Consequently, the parallelism between the actions of Hines and Henderson parted at the crucial point—the introduction of the girl into prostitution. And the failure of the appellant to make a move to do so, though presented with the opportunity, casts grave doubt on whether he ever intended to lead Joyce into prostitution, as well as on the fact that he entered into a conspiracy with Hines to become a white slaver.

Indeed, the whole transaction in finding and bringing the girls to New York was much too casual and coincidental to support the conclusion that this was done as part of a preconceived plan by the petitioner. Meeting the girls was no more than a simple "pick up," and even after having made love to Joyce in his hotel room, the petitioner could not have expected her to leave with him the next day. Indeed, the intervening factor of Joyce's argument with her father, the true stimulus for the trip, could not have been foreseen or even contemplated by the petitioner. Even the girls testified that their return to the hotel and decision to go to New York was fortuitous and a total sur-

prise to the petitioner. Yet Henderson was apparently ready to leave for New York, regardless of whether the girls came back. Thus, the encounter with the girls in Minneapolis was apparently without plan or design. It was done in a wholly non-conspiratorial fashion. Prostitution was never mentioned there, and the girls intended to go to New York for other reasons.

A part of the government's case is innuendo drawn from the supposition that Henderson was, by profession, a pimp. Yet even if Henderson had some association with prostitutes in New York, that does not make every encounter of his with a girl part of a plot to lead her into prostitution. Indeed, it may be compared with a trip taken out of the state by a prostitute, and a gentleman friend, where such a trip and the return across state lines to her professional activity does not create a violation of the statute [*Mortenson* v. *United States,* 322 U.S. 369; *United States* v. *Ross,* 257 F 2d 292 (2d Cir. 1958)].

In sum, the government's proof of conspiracy rests simply upon an association of Henderson with Hines, a person who intended to lead his girl into prostitution. But as the court wrote in *Dodson* v. *United States,* 215 F 2d 196, 199 (6th Cir. 1954), quoting from Learned Hand's observations in *United States* v. *Falcone,* 109 F. 2d 579, 591 (2d Cir. 1940), "the opportunities for oppression that exist when prosecutors seek to 'sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offender, have long been recognized." This case in no way dilutes that recognition.

POINT II

Absent proof of a conspiracy the acts and declarations of James Hines were inadmissible in evidence, and the substantive count must be reversed.

The acts and declarations of James Hines, and his associate Linda were admissible against Henderson only because a conspiracy was charged. Since the evidence failed to sustain the conspiracy, the testimony relating to James Hines' activities with Christie Lee Saff were inadmissible, and Henderson is entitled to a reversal of his conviction on the substantive count on two grounds. First, without the evidence of Hines' activities, there is insufficient proof of Henderson's intent, and the substantive count in the indictment must be dismissed. Second, since this illegal and highly prejudicial evidence was considered by the Court in rendering its verdict (R. 294), Henderson is at least entitled to a new trial where this evidence is not displayed before the fact finder. The conspiracy accusation is a valued tool whose application appears to extend beyond the bounds of reason.

Conclusion

The petition for a writ of certiorari granted.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
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No. 71-168

In the Supreme Court of the United States

OCTOBER TERM, 1971

RONALD HENRY [illegible], PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-168

RONALD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioner was convicted of transporting two women in interstate commerce for purposes of prostitution, in violation of 18 U.S.C. 2421, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371.[1] He was sentenced to two years on each count, to run concurrently (App. 312). The court of appeals affirmed without opinion.

[1] The trial judge summarized the evidence and gave his reasons for convicting petitioner on these charges, while acquitting him of other charges under 18 U.S.C. 2422 and 2423 (App. 289-295). "App." refers to the appendix in the court of appeals, which the government is lodging with the Court.

443-241—71

Joyce Tiedens and Christie Saf, two seventeen year old girls living in Minneapolis, gave detailed testimony which the trial court characterized as "persuasive, convincing and entirely credible" (App. 292). The two girls, returning from a party celebrating Joyce's seventeenth birthday, were picked up in Minneapolis by petitioner, co-indictee Bernard, and another man. Later at a motel, Christie asked one of the men in the presence of the others what they did for a living and was told that they were pimps. Petitioner asked the girls if they wanted to go to New York. Christie said no; Joyce said yes, but did not mean it seriously (App. 12, 14–19, 20, 141–142, 144).

On the following day, Joyce had a quarrel with her father. She and Christie returned to the motel and told petitioner they wanted to go to New York. Petitioner and Bernard planned to leave with the girls that night. Petitioner told Joyce she did not need any money, that he would take care of her and would get her anything she wanted (App. 22). On the way to the airport, the men advised the girls to change their names and to claim that they were nineteen, and gave them money for their tickets (App. 23–24, 148–149). When they stopped overnight in Chicago, neither of the girls was permitted to call her parents (App. 25–26, 152). On the plane to New York, petitioner asked Joyce if she would do anything for him, "like to be a bank robber or a prostitute"; she replied that she would not (App. 26).

In New York, the two couples went together to an apartment house, and afterwards petitioner took Joyce

to the apartments of two girl friends. Both girls gave petitioner money; one asked whether Joyce was going to work that night (App. 27–29). Petitioner bought Joyce clothing and took her to a hotel, where he gave her about three hundred dollars. On the following day, petitioner sent Joyce to a doctor for birth control pills, and told her that they would talk about business later (App. 29–34).

In the meantime, Bernard introduced Christie to his friend Linda, whom Christie understood was a prostitute. Christie told Bernard she wanted to go home, but he grabbed her by the arm and told her she was staying (App. 153–156). Bernard arranged a room for Christie, and had Linda instruct Christie how to operate successfully as a prostitute (App. 159–161). When Christie got to her room, she called her parents and the police (App. 162–163).

The New York police notified the F.B.I. of Christie's call. An F.B.I. agent subsequently went to Joyce's apartment and talked with her. When petitioner came to the room and saw the agent, he fled, and was apprehended by another officer (App. 35).

On this record, the trial judge found petitioner guilty of unlawfully transporting interstate a female for immoral purposes, and of conspiring with Bernard to do so. Plainly, the evidence that the judge credited (see App. 292–295) provides ample support for this conclusion. The two men cooperated in planning the trip to New York, providing the funds for the girls' tickets, advising the girls to falsify their names and ages, arranging the overnight stay in Chi-

cago, and finally taking the two girls to the same apartment house in New York. Even if petitioner and Bernard intended to go their separate ways after they reached New York, the evidence concerning their acts in New York was admissible to show the purpose of the conspiracy to transport. *Lutwak* v. *United States*, 344 U.S. 604, 617.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-168, 71-384

ERNEST KLEIN,

Petitioner,

vs.

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, JOHN J. BOWER and BOWER, O'CONNOR AND TAYLOR,

Respondents.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
STATEMENT OF FACTS	1
The Parties to the Litigation	1
Appellant's Activities Resulting in the Present Litigation and Injunction	2
The Injunction Pendente Lite	4
ARGUMENT	10
CONCLUSION	11
APPENDICES:	
A—Affidavit in Support of Motion	1a
B—Order of the United States District Court	15a
C—Memorandum and Order of the United States District Court	17a
D—Order on Motion of the United States Court of Appeals	22a
E—Order of the United States Court of Appeals	23a

Cases Cited

Klein v. Bower, et al., C. C. H. Fed. Sec. L. Rep. page 32,362 N. 7 (S. D. N. Y., 1967)	6
Klein v. Spear, Leeds & Kellogg, C. C. H. Fed. Sec. L. Rep. Page 92,454 (S. D. N. Y., 1969) Current Ed.	2

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vs.

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, JOHN J. BOWER and BOWER, O'CONNOR AND TAYLOR,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of Facts

The Parties to the Litigation

The appellant, Ernest Klein, is a perennial litigant who has been engaged for many years in securities transactions, usually followed by lengthy and often multiple liti-

gation.* Respondents are attorneys engaged in the practice of law in the State of New York as a partnership. The plaintiffs-respondents successfully defended an action brought by the appellant in Supreme Court, New York County, arising out of a transaction in October, 1958, wherein the appellant pledged securities, consisting mainly of convertible bonds, with a factor, Securities Clearance Corporation, to secure loans made to him on a three percent margin.

The action went to trial on April 18, 1966, before Mr. Justice Thomas A. Aurelio and a jury. After the plaintiff had taken over two weeks to put in his case, the court on April 29, 1966, granted the defendants' motion for judgment.

A final judgment was entered against the appellant on June 23, 1966, and that judgment was subsequently affirmed unanimously by the Appellate Division, First Department (27 A. D. 2d 801, 1967). Plaintiff's motion for leave to appeal to the Court of Appeals was denied by the Appellate Division and subsequently by the Court of Appeals (20 N. Y. 2d 645).

Appellant's Activities Resulting in the Present Litigation and Injunction

1. Following the loss of appellant's suit against Securities Clearance, *et al.*, which was defended in part by respondents, the appellant made a complaint to the District Attorney of New York County accusing respondent Bower of committing perjury and forgery. As a result of that complaint an investigation was undertaken against

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* See E. P. G. *Klein* v. *Spear, Leeds & Kellogg*, C. C. H. Fed. Sec. L. Rep. Page 92,454 (S. D. N. Y., 1969) Current Ed.

respondents by the District Attorney of New York County. That complaint was held to be unfounded.

2. On or about May 12, 1966, the appellant obtained a summons from the Criminal Court, New York County, charging respondent Bower with the crime of perjury, necessitating an appearance in Criminal Court on behalf of the appellant on two occasions. That complaint was dismissed by the court as unfounded.

3. In late May or early June, 1966, the appellant Klein made a complaint against Bower, O'Connor and several secretaries in the firm of Bower, O'Connor & Taylor charging all with committing crimes in their actions as Notaries, and of abusing their Notarial office, and of being guilty of moral turpitude. An investigation was conducted based upon the complaint of the appellant Klein, by the Secretary of State, which claims by the appellant Klein proved to be unfounded.

4. In early June, 1966, appellant Klein made a complaint to the District Attorney of Queens County against Bower and O'Connor alleging forged signatures, and abuses of Notarial offices. That complaint resulted in the respondents being subpoenaed to the office of the District Attorney of Queens County and that charge was found to be unfounded.

5. On or about June 28, 1967, the appellant Klein commenced an action in Supreme Court, Kings County charging Boyer with conspiracy to commit libel and O'Connor with committing libel in papers filed in the original action tried before Mr. Justice Aurelio. Respondents' motion to dismiss the complaint was eventually granted. That dismissal was sustained by the Appellate Division, Second Department.

6. In January of 1968 the appellant Klein acting with others brought charges against Boyer, O'Connor and

several female employees in the firm of Bower, O'Connor & Taylor, to the Secretary of State alleging that they were persons of moral turpitude, who abused their Notarial offices and forged each other's signatures and otherwise committed violations of laws. These charges resulted in a full hearing during which appellant Klein failed to produce any evidence against either Bower or the two female Notaries in the law firm and after a complete hearing which included a submission of handwriting samples to the State Police Laboratory the appellant's claims were found by the hearing officer to be unfounded, and that there were no violations of law.

7. Commencing in January, 1968, the appellant Klein with the assistance of others went to the homes of some of the employees of the respondent law firm and contacted present and ex-employees in an attempt to coerce, frighten and terrorize them into giving untrue statements. In addition appellant Klein in concert with others went to employees' neighbors and made numerous inquiries and derogatory statements concerning them.

8. To defend the above unfounded claims and complaints, respondents were required to make numerous court appearances thus depriving them of making a livelihood in their professional calling.

The Injunction *Pendente Lite*

9. Since the respondents' reputation and livelihood were seriously damaged by having to respond in work effort and time to the many unfounded claims instituted by the appellant, an injunction *pendente lite* was sought and granted by Mr. Justice Francis T. Murphy.

10. The motion for the injunction *pendente lite* was served upon the appellant on the 7th of May, 1968, made returnable on the 27th of May, 1968. Thus an extraor-

dinary amount of time for the motion was given to the appellant to avail himself of an opportunity to be prepared. On the 27th day of May the case was called and the appellant appeared in person and told the court that the matter was so complicated he needed six months to read it and find a lawyer. At that moment he had several law firms representing him in some of his numerous lawsuits including his own son who is a lawyer.

11. In the interim, between the time that the motion for an injunction *pendente lite* was first called on the 27th of May and the day that it was ultimately heard, peremptorily against the appellant on the 31st, the appellant had caused to be issued two new summonses without complaints as against the respondents in Supreme Court, Kings County.

12. Thus, on the 31st day of May, 1968, Mr. Justice Murphy was faced not only with the prior activity of the appellant but similarly faced with the continual activity on the part of the appellant to precipitate numerous lawsuits as against the respondents in detriment of their standing in the legal community and in an attempt to deprive them of earning a livelihood by engaging them in multivarious lawsuits of a like nature as prior lawsuits, all of which had been dismissed or upon a full hearing determined to have been unfounded in fact; several of which were instituted during the pendency of the motion for injunctive relief *pendente lite*.

13. Similarly Judge Murphy was faced with the fact of a plaintiff who had taken great liberty with the judicial process and who was not a limping, inarticulate plaintiff but one of extensive experience in litigation whose argument was clear in expression and vigorously bitter in denunciations as well as inexhaustible in length.

14. Neither on the first day of the calling of the motion, namely the 27th of May, 1968, nor the 29th, nor the 31st

did the appellant Klein submit any papers in opposition to the motion and at no time has he asserted a meritorious defense to the action.

15. The lower court was not faced with a novice in litigation but one who engaged in at least thirty lawsuits, utilizing at lease ten different lawyers and at times terminating their services, to proceed *pro se* if it suits his purpose in those cases or the present one.

16. Pending the signing of the order of injunction *pendente lite* granted by Mr. Justice Murphy, appellant commenced a suit in the Federal Court against the respondents herein and numerous banks as well as secretaries and employees of the respondents' firm. A motion to dismiss that action was granted by Judge Tyler in *Klein* v. *Bower, et al.*, C. C. H. Fed. Sec. L. Rep. page 32,362 N. 7 (S. D. N. Y. 1967).

17. The order of injunction was signed on the 10th of July, 1968, and served upon Klein on August 23, 1968.

18. By notice dated the 13th day of August, 1968, the appellant saw fit to appeal from the injunction. That appeal was dismissed by order of the Appellate Division, First Department, dated the 17th of October, 1968.

19. Subsequent to the injunction *pendente lite* and while it was in full force and effect, in addition to instituting actions against the respondents in the State Courts the appellant Klein brought an action against the Secretary of State to reinstate a hearing as against the respondents and secretaries in their office reasserting the prior claim of perjury and forgery.

20. Appellant Klein's action against the Secretary of State to reconsider reopening the hearing as against respondents Bower and O'Connor as well as against several of the employees in the respondent law firm, was viola-

tive of the decretal paragraphs of the order of injunction, pages 6, 7 and 8.

21. In addition appellant Klein instituted a motion in Supreme Court, New York County, for a vacatur of the prior dismissal of the initial action of *Klein* v. *Securties Clearance, et al.,* which similarly was violative of the injunction.

22. By motion dated January 8, 1969, and affidavit sworn to the 7th day of January, 1969, the appellant Klein instituted a notice of re-argument in the Appellate Division, Second Department, in the action of *Klein* v. *O'Connor, et al.* (the said action being one by the appellant Klein as plaintiff against O'Connor and the law firm of Bower, O'Connor & Taylor as well as certain employees within the law firm, for alleged libel, slander and conspiracy to commit same), which action had previously been dismissed and the dismissal upheld by the Apellate Division, Second Department.

23. In addition the appellant Klein, on or about January 8, 1969, submitted an order to show cause *ex parte* before Mr. Justice Greenfield to have certain files previously under seal, opened for examination, the said file being the same action of *Klein* v. *Securities Clearance, et al.*

24. Based upon these activities on the part of the appellant Klein, violative of the injunction *pendente lite,* which was then in full force and effect, the Supreme Court, New York County, by Hon. Samuel M. Gold, entered an order on the 21st day of May, 1969, after full hearing, citing the appellant Klein in contempt of the order of the Supreme Court.

25. In abundant support of the necessity for the injunction being initially issued, your deponent respectfully attaches hereto as Appendix A the affidavit of John J.

Bower, duly verified the 7th day of May, 1968, interposed in support of the motion for injunctive relief *pendente lite.*

26. Supportive of the proposition that Klein was well aware that the injunction did not preclude his taking legal steps are the procedural steps that he, in fact, did utilize.

27. Appellant thereafter instituted yet another Federal action, seeking to once again relitigate the time worn theme—this action was dismissed by Judge Bonsal, Appendix B.

28. By order dated the 25th day of March, 1971, Judge Bonsal dismissed the complaint in this action as against all defendants. Attached hereto and respectfully made a part hereof is a copy of said order of dismissal as Appendix B.

29. Prior to the order of Judge Bonsal, which was dispositive of the entire matter, the plaintiff sought preliminary relief by Order to Show Cause seeking essentially the same relief sought in the appeal herein. Attached hereto and respectfully made a part hereof as Appendix — is a copy of the decision of the United States District Court, Southern District of New York, dismissing that Petition, dated August 25, 1970, Appendix C.

30. Subsequent thereto and still prior to the ultimate dismissal by Judge Bonsal, the plaintiff sought additional preliminary relief which was denied by Judge Wyatt by his Order dated January 11, 1971, a copy of which is attached hereto and respectfully made a part hereof as Appendix D. Petitioner seeks to likewise perpetuate that appeal, which was for all intents and purposes superseded by the ultimate dismissal.

31. Petitioner herein seeks to raise the time worn argument that he is denied the right to counsel on the mo-

tions and appeals herein, which is belied by the activity engaged in by him.

32. It is submitted that there was a full hearing in which Petitioner's position was clearly set forth to the Court in the initial two motions for preliminary relief, as evidenced by the decisions of the United States District Court for the Southern District of New York, as contained in their decisions, Appendices C and D attached hereto.

33. Judge Wyatt's decision of January 11, 1971, in denying relief designated as (b) on the basis that such relief was unnecessary "since so far as this Court is concerned, plaintiff may appear by counsel if he so desires", shows that the perpetual claim of lack of legal counsel is unfounded.

34. The fact that the plaintiff made the motion and hearings were held thereon renders the suggested inability to obtain counsel as being a spurious argument at best.

35. Clearly, as set forth in Judge Bonsal's decision, Petitioner Klein had legal counsel, one Robert A. Katz, who, through the fiction of not formally appearing in behalf of the plaintiff, was nonetheless fully heard at Petitioner's request at the oral argument, at which time Petitioner was himself present.

36. It was only after full oral argument and due deliberation thereon that Judge Bonsal properly dismissed the complaint herein, since the purported new complaint was nothing more than a regurgitation of a complaint which had previously been reasserted in the Federal Court under Docket Number 68 Civ. 2687, being itself an attempted relitigation of a State Court action dismissed in the State Court and which dismissal was affirmed all the way up to the Court of Appeals.

37. The initial Federal Court action (68 Civ. 2687) dismissed in the Southern District of New York was in the usual course appealed to this Honorable Court, resulting in the same multitudinous requests for additional time, as is being sought in the instant action. This Honorable Court ultimately issued its mandate when it became obvious that the Petitioner therein was engaging in a repetition of his prior activity of attempting to engulf the defendants herein in unnecessary expenditure of time and effort to respond to a torrent of perpetual requests for adjournments and extended time.

38. The Petitioner here once again seeks to intrude upon the defendants' practice of their profession by engaging them in responding to unnecessary appeals.

Similarly, as Judge Wyatt's order clearly enunciates, the Petitioner Klein had a right to counsel as explicitly set forth in (B) of his decision of the 11th of January, 1971. So, too, the United States Court of Appeals for the Second Circuit in its decision (Appendix E) does not limit the petitioner's right to counsel. Rather, quite appropriately and consistent with the prior order of Judge Bonsal, it merely does not intrude upon the injunction of the State Court.

ARGUMENT

By the very language of the District Court's orders; (Appendix C), Wyatt, J. (Appendix D) as well as the United States Court of Appeals for the Second Circuit, Appendix E, the Petitioner in no way was deprived of a right to counsel and in fact, was apprised that as far as those Courts were concerned, the Petitioner may proceed by counsel if he so desires.

Thus, the alleged denial of personal counsel is totally without merit; and no Federal question is raised to warrant certiorari being granted.

CONCLUSION

Certiorari should be denied on both petitions, numbered 71-384 and 1706.

Respectfully submitted,

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Of Counsel

[APPENDICES FOLLOW]

APPENDIX A

Affidavit in Support of Motion

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 5810/1968

JOHN J. BOWER and BOWER, O'CONNOR & TAYLOR,
a partnership,

Plaintiffs,

—against—

ERNEST KLEIN, NATHAN N. SCHOER, BENJAMIN ISAACS,
ALBERT B. LEWIS and LAJOS LAUFER,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. BOWER, being duly sworn, deposes and states:

1. I am a partner in Bower, O'Connor & Taylor, attorneys practicing at 350 Fifth Avenue.

2. I make this affidavit on my personal knowledge and upon such information and belief as is revealed by the investigation contained in my file.

Appendix A

3. This is an action in which I as an individual plaintiff and my firm brought an action against the defendants for their willful tortious conduct, seeking both damages and an injunction permanently restraining the defendants from engaging further in their course of harassment and interference with plaintiffs, professional and private activities.

4. This is a case of first impression in New York as my research has failed to reveal a similar course of conduct on behalf of any defendants in this State, or, for that matter, in any other State. The Complaint which is hereto annexed and is referred to from time to time and which I request to be deemed a part of the moving papers contains twenty causes of action. For the sake of brevity, these can be summarized as follows: The first, second, third, fourth, fifth, sixth, eighth, ninth and tenth causes of action are for the traditional tort of malicious, willful falsehood with intent to harm the plaintiff; the seventh cause of action is for slander; the eleventh and twelfth causes of action are for malicious prosecution; the thirteenth cause of action is for a continuing repetitive and malicious course of conduct to damage plaintiffs willfully by interfering with and disrupting the professional activities and by interfering with plaintiffs' mental, emotional, financial and professional well-being by engaging in a series of incessant accusations, false and injurious statements and criminal charges and civil proceedings for the purpose of damaging the plaintiff; the fourteenth cause of action is for special damages necessarily incurred; the fifteenth cause of action is for continued willful harassment of the plaintiff law firm; the sixteenth cause of action is against defendant Isaacs, who participated with and in fact instigated

Appendix A

the bringing of false charges against the plaintiffs; the seventeenth cause of action is against defendant Lewis who instigated, aided and abetted and participated with defendant Klein in making false, malicious and unwarranted charges of criminal nature against the plaintiff; the eighteenth cause of action is against defendant Schorr for falsely and maliciously and recklessly issuing false statements in the nature of a handwriting expert's opinion against the plaintiff either through willful maliciousness or through gross incompetence; the nineteenth cause of action is for an injunction and the twentieth cause of action is for punitive and exemplary damages against the defendants.

5. This action was commenced by service upon defendant Klein of the summons on March 29, 1968. He appeared on April 5, 1968 and the complaint was served upon him on April 24, 1968. Defendant Isaacs was served on March 28, 1968 and he appeared on April 8, 1968. The complaint was served upon him on April 24, 1968. The summons was served on defendant Schorr on March 26, 1968 and he is in persistent default. The summons was served on defendant Lewis on March 26, 1968 and he appeared on April 30, 1968. The complaint was served upon him on April 30, 1968. Defendant Laufer was served by Section 308 Subdivision 3 CPLR and the summons with affidavit of service was duly filed in the Clerk's office on April 8, 1968 but there has been no appearance by defendant Laufer as yet.

6. To summarize the matter for the Court in the briefest possible fashion the following are the facts from which this law suit arose:

Appendix A

(a) I had been named a defendant as I had been the officer of a corporation in 1958 without actually participating in its day-to-day affairs, in which law suit Ernest Klein, one of the defendants in 1961 sued Securities Clearance Corp. and a number of banks and private individuals who were stockholders or officers of the aforesaid corporation. This action was instituted by defendant Klein for transactions which occurred in 1958, in the year 1961 and bore New York Supreme Court, New York County Index Number 18651/61. In that law suit my firm, Bower, O'Connor & Taylor, acted as my defense counsel. The action came to trial in April of 1966 before Mr. Justice Aurelio and after a lengthy presentation of the plaintiff's case lasting almost two weeks the Court dismissed the complaint as against all the defendants at the end of plaintiff's case. This dismissal was affirmed unnaimously by the Appellate Division of the Supreme Court and leave to appeal to the Court of Appeals was denied.

(b) The loss of this law suit prompted defendant Klein and subsequently prompted his co-defendants to engage on a calculated campaign of false charges, malicious prosecution, willful malicious falsehoods, slander and baseless litigation with harassment and molestation without equal in my experience and without any precedent for such conduct in the annals of the jurisprudence of this State. The chronology of his acts and of the co-defendants' participation is set forth in the complaint but for the purpose of supplying adequate moving papers the following chronological sequence should be stated:

Appendix A

(1) Shortly after the aforesaid law suit was dismissed without any factual basis defendant Klein on information and belief made a complaint to the District Attorney of New York County falsely accusing me of having committed perjury, forgery, grand larceny and other unspecified crimes. I was informed by defendant Klein of the making of such complaint and that an investigation was being undertaken against me by the District Attorney.

(2) On or about May 12, 1966 defendant Klein obtained a summons from the Criminal Court, New York County charging me with the crime of perjury, came to our office shortly thereafter with a Police Officer and in the presence of our office staff served the summons upon me. This criminal charge was completely false and malicious and after I appeared in the Criminal Court on two occasions the charge was dismissed.

(3) That sometime in late May or early June, 1966 defendant Klein made a complaint against me, one of my partners, William F. O'Connor and several secretaries in our office, Mary Anna Macukas and Carolyn Schiff charging us with committing crimes in our actions as Notaries and of abusing our notarial office and of being guilty of moral turpitude. This charge too was false and maliciously made. An investigation was conducted by the Secretary of State and I as well as my partner and office help was required to respond to these charges, which we did.

Appendix A

(4) That similarly, sometime in early June 1966 defendant Klein made a complaint to the District Attorney of Queens County against me, my partner, William F. O'Connor and the aforesaid two young ladies in our office complaining that we forged signatures, abused our offices as Notaries and committed other crimes. We were subpoenaed to the office of the District Attorney of Queens County, had to participate in the role of an accused in an investigation and did so. The charge was maliciously and falsely made.

(5) That on or about June 30, 1966 defendant Klein made a motion for an order in the civil action of *Klein* v. *Securities Clearance Corp.*, as aforesaid, to compel certain evidentiary material to be deposited with the Clerk inferring that I or members of my firm were about to commit additional felonies and steal such exhibits. This was completely false and maliciously charged.

(6) That on or about June 28, 1967 defendant Klein commenced an action in the Supreme Court, Kings County charging me with "conspiracy to commit libel" and charging my aforesaid partner, William F. O'Connor, with committing libel in papers filed in the original action tried before Judge Aurelio. This action was brought without any basis of fact and for malicious and tortious purposes and our motion to dismiss the complaint was eventually granted.

(7) That on or about January 16, 1968 while the aforesaid motion was argued in Supreme Court, Kings County defendant Klein in the

presence of Justice Charles J. Beckinella and a number of attorneys with whom I have had honorable business dealings for a number of years, uttered words which were totally outside the scope of the issues in that law suit as well as the facts encompassed in the motion to dismiss and called me a perjurer, a forger, a liar and a thief.

(8) That sometime in the year 1966 and in the year 1967 the defendant Klein procured, upon information and belief, opinions from a self-styled handwriting expert, defendant, Nathan N. Schorr, who is in fact a high school history teacher and a Rabbi (as is defendant Klein) which opinions were false, untrue, maliciously and wantonly made and/or made with a great degree of unreliability and incompetence, and armed with said false and fraudulent reports from co-defendant Schorr made a complaint to the District Attorney of New York County charging me with having committed perjury concerning certain exhibits which were used in the trial of *Klein* v. *Securities Clearance Corp.* The District Attorney thereupon notified me that a complaint was made and an investigation was underway. An investigation was in fact made and laboratory analyses failed to establish that I was guilty of any crime at all. This did not satisfy defendant Klein who thereupon with the aid of defendant Lewis, a State Senator from Brooklyn brought additional charges, upon information and belief, against me both at the office of the District Attorney of New York County and at the Department of State of the State of New

York. Defendant Lewis without knowing any factual basis, without making an investigation, in concert with defendant Klein brought additional false charges against me in the nature of perjury and forgery, upon information and belief, caused an additional investigation to be made by the District Attorney and by the Secretary of State of the State of New York. Insofar as these charges at the office of the District Attorney were concerned, I have been advised by the office of the District Attorney that the laboratory examinations established my complete innocence of any charge made against me.

(9) At the same time on January 5, 1968 defendant Klein acting with defendant Isaacs, upon his advice, and with his instigation and participation brought additional false and malicious charges against me, my partner, William F. O'Connor and the aforesaid two female employees of our firm to the Secretary of State, alleging that we were persons of moral turpitude, abused our notarial offices, forged each other's signatures and otherwise committed violations of law and requested that action be taken against us in the revocation of our notarial office. These charges resulted in two hearings during which defendants Klein and Isaacs failed to present one iota of evidence against me or against the two female Notaries, and at one of these hearings defendant Schorr testified that Mr. O'Connor's signatures were not his. The hearing officer thereupon submitted the handwriting samples to the State Police Laboratory whose ex-

pert, Lieutenant McCarthy completely refuted and repudiated this false charge against Mr. O'Connor as well.

(10) That on or about March 25, 1968 defendant Klein brought on a motion in the aforesaid case of *Klein* v. *Securities Clearance Corp., et al*, again requesting the deposit of exhibits and again inferring that I was either a perjurer or a forger and that if I was not then I knew who committed perjury and forgery and that I or my office associates were about to seal the exhibits.

(11) That upon information and belief during the past five months, commencing with January of 1968 defendant Klein and co-defendant Laufer with the assistance of others, presently as yet unknown engaged in a further course of harassment and molestation of our employees, ex-employees and families, went to the homes of some of them, attempted to coerce them, frighten and terrorize them into giving them statements, into signing their names, as well as my name and my partners' names, made annoying and threatening phone calls, went to our employees' neighbors and made numerous inquiries, made derogatory statements concerning them, called our homes under false pretenses, went to Police Stations requesting the Policemen's assistance in making a "citizen's arrest" for false and nonexistent crimes, resulting in constant harassment, molestation and amounting to a calculated conduct to deprive me, my partners, my firm, our employees and families from enjoying peace of mind.

Appendix A

7. All of the charges brought by the defendants me were totally false, were brought with knowledge of their falsity, willfully and maliciously, and were calculated as wrongful acts performed solely for the purpose of harassing, molesting and injuring me as well as my firm and its employees, had no basis in fact other than the desire to "get even" for an imagined wrong and were brought for the purpose of engaging us in continued litigation, in the defense of charges constantly made and renewed, from which no surcease has been had. The complaint amply states these acts and their consequences as well as the damages resulting therefrom. Nor are these acts over as yet, as defendant Klein and his cohorts, upon information and belief are continuing their harassment as appears from the papers hereto annexed.

8. Defendant Klein is no novice to litigation. He is an experienced litigant, one who has participated in at least thirty law suits involving stockbrokers, banks, factors and lawyers, and is in the habit of at least on two occasions bringing similar charges against lawyers whose clients prevailed against him. His son is an attorney who represented him in a number of cases, and he litigates his own matters with relish on other occasions. On information and belief he has been represented by at least ten different lawyers in the multitude of the suits brought by him and has been represented by counsel in all his dealings with me and my firm until, finally, I decided to sue him when he appeared as a defendant pro se. He exhibits considerable sophistication in the law, and is using his status as a layman as a sword not as a shield because, even when he is represented by the attorney he is in the habit of showing up and arguing his own motions on occasion.

Appendix A

9. All of the causes of action here although labeled according to certain legal precepts are in fact bottomed in a willful, malicious course of conduct circulating falsehoods, the willful infliction of mental distress, malicious prosecution, slander, conspiring to engage in a scheme to destroy the plaintiffs both in a professional capacity and in their mental and physical well-being. The scheme although the causes of action are broken down into each individual act on each occasion, is unmistakable as the defendant Klein with the participation of his co-defendants has decided to wreak havoc with our professional reputations, our peace of mind, our well-being and our finances by tying us up continually, by keeping us busy defending charges before administrative agencies, by running to various politicians, on information and belief, not limited to but including defendant Lewis, by a course of conduct which can only be described as two years of unmitigated and unrelenting hell which in scope and in its quality of pure evil is without parallel. Added to this is the fact that defendant Klein holds himself out as an Orthodox Rabbi, wears the garb of one, cuts a patriarchal figure on first impression and receives hearings from public agencies and officials which one would not ordinarily receive. He knows in his malice that wherever he makes complaints an investigation will follow and since we have been the targets of these investigations we are the recipent of this unlimited evil and tortious conduct.

10. Unfortunately we have no adequate remedy at law:

(a) I have asked the District Attorney's office for public protection. I spoke to one of the Assistant District Attorneys in March of 1968 and was advised that since the barratry section of the Penal Law has been eliminated in the new Penal

Appendix A

Law there is no criminal sanction available against the defendants and there is nothing the District Attorney can do to give me protection.

(b) Since I have read the minutes of supplementary proceedings of judgment creditors who have obtained judgments against defendant Klein I noted that he was judgment-proof and such insolvency was even to the point where he testified that the house he lived in was not his, the car he drove was not his, he received no pay, owned no property and was in effect judgment-proof. Obviously then this present action for damages is neither a true deterrent from his continued course of conduct nor is it, in a practical sense the kind of Sword of Damocles which would prevent the continued commission of these torts which, after all, cost him nothing. It is precisely for this reason that the complaint embodies injunctive relief and why this motion is so necessary to protect us from any further willful, malicious, tortious conduct on the part of the defendants until a trial may be had. We have no other protection, there is no other law criminal or civil that can possibly protect us, and we are mindful of the doctrine that equity must be tailored to meet the exigencies of the situation and to remedy the evil which it is designed to prevent.

11. We are not asking this Court for an injunction pendente lite which will go on for untold years. In fact, what we are saying is that after issue is joined by all parties and brief discovery proceedings are over i.e. depositions of the defendants are taken we shall be in a position to have the case go to an immediate trial in the fall.

In fact, a motion for a special preference because of the extraordinary conduct of the defendants will be sought for a trial in early fall. Of course, we are plagued with the problem that the defendants may, at their option make such motions as they see fit and, if there may be a decision adverse to either side an appeal on a purely procedural matter may be pending for some time. Therefore, although the matter coming to trial has great, in fact pressing urgency to us it may not in fact have such urgency to everyone in the law suit and this is precisely why we need an injunction pendente lite.

12. We are an established firm of attorneys engaged in the active practice of law and we have, I trust, an excellent credit rating and are known for our promptness and fairness in paying our bills. We are of the opinion that a bond is not truly needed under these circumstances should the Court be disposed to grant the relief sought. However, if the Court is of the opinion that a bond should be put up, we request that the bond be set in an amount which we can afford i.e. in the sum of One Thousand ($1,000.00) Dollars.

13. In view of the foregoing I respectfully request that an injunction pendente lite be made enjoining the defendants during the pendency of this law suit from making any further complaints, charges, from bringing on claims, causes of actions, civil litigation and other vexatious matters either criminal or civil in nature, against the plaintiffs, enjoining any further prosecution and harassment of the plaintiffs, their employees, partners, associates, and their respective families, and restraining the defendants from interfering with, molesting or harassing the plaintiffs, their associates, partners, employees, and

their respective families any further and in any other manner and that defendants be stayed during the pendency of this action from making directly or indirectly any contact with the plaintiffs, their partners, associates, employees and their respective families directly or indirectly in any manner except for making such applications to the Court and serving such papers in the presently pending actions as may be legally sanctioned.

s/ JOHN J. BOWER

Sworn to before me this
7th day of May, 1968

FRANCES MUCEDOLA
Notary Pubic, State of New York
No. 43-280725
Qualified in Richmond County
Commission Expires March 30, 1969

APPENDIX B

Order of the United States District Court

(Filed—Mar. 30, 1971 S.D.N.Y.)

At a Motion Part of the United States District Court for the Southern District of New York at the Court House, Foley Square, New York, New York on the 25th day of March, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 213

ERNEST KLEIN,

Plaintiff,

—against—

JOHN J. BOWER, WILLIAM F. O'CONNOR, JOHN GARDNER, BOWER, O'CONNOR & GARDNER, a partnership, MARY ANNA MACUKAS, MARY ANN OATES, and CAROLYN SCHIFF,

Defendants.

Defendants, having moved this Court to dismiss the above captioned action pursuant to Rule 12 (b) and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the basis that the complaint fails to state a claim upon which relief can be granted,

that the Court lacks jurisdiction over the subject matter of the action as the claims asserted by the complaint are barred by the statute of limitations, collateral estoppel and res judicata, and the Court having read and filed the notice of motion dated February 2, 1971, the statement of John Gardner, Esq., pursuant to Rule 9 (g), thereto annexed, the affidavit of John Gardner, Esq., sworn to the 2nd day of February, 1971, and exhibits thereto annexed, all in support of said moving defendants' contentions and the motion having regularly come on to be heard before me on the 16th day of March, 1971, and Robert A. Katz, Esq., while not formally appearing in behalf of the plaintiff herein, but at his request, having been heard in oral argument on the motion, and the plaintiff being present in Court, and the Court further having held oral argument, and due deliberation having been had thereon,

Now, on motion of John Gardner, Esq., attorney for the defendants above named, it is

ORDERED, that the motion of the aforesaid defendants, for a dismissal and for summary judgment, be and the same hereby is granted in all respects and it is further

ORDERED, that the complaint in the action of the plaintiff against the aforesaid defendants be and the same hereby is dismissed, and it is further,

ORDERED, that judgment of dismissal be entered by the Clerk of the Court in favor of the aforesaid defendants against plaintiff.

Dated: New York, N. Y.
March 30, 1971

DUDLEY B. BONSAL
U.S.D.J.

Judgment entered 3-30-71

JOHN LIVINGSTON
Clerk

APPENDIX C

Memorandum and Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70 C 980

ERNEST KLEIN,

Petitioner,

—against—

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

Respondent.

On July 10, 1968, Petitioner had entered against him in the Supreme Court of the State of New York, County of New York, a formidable order enjoining him, *pendente lite* from interfering with John J. Bower, (a Lawyer) and his firm (Bower, O'Connor & Taylor) in their business and profession, from bringing any charge or instituting any claim or inquiry, public or private, against them, their employees or their families, from issuing any summonses, complaints or counterclaims (even in the pending action) against them, and from issuing any civil process against them; the order stayed all Petitioner's pending actions against Bower and his firm, enjoined the issu-

ance of any civil process against them or instigating its issuance, harassing Bower and his firm by the use of quasi-public or private agencies, from making or instigating the making of personal inquiries about Bower, his firm, its employees and their families, and from leading people to believe that Bower, his firm or its employees are under inquiry; the order requires Petitioner to cease and desist from in any way impugning the honesty or integrity or professional conduct of Bower, his firm, its employees and their families. The order of injunction was made in an action, not yet tried, against Petitioner and others for alleged tortious misconduct that, broadly, comprised alleged vexatious litigation, slander, and the use of a variety of harassing activities. The whole matter apparently grew out of financial transactions of Petitioner in 1958 with a securities firm represented by Bower, O'Connor & Taylor, or a predecessor firm; that transaction led to a 1961 state court suit against the securities firm, a banking firm, certain persons associated with the securities firm and John Bower: Tried to a jury before Mr. Justice Aurelio in New York County Supreme Court in April 1966, the action was dismissed at the close of plaintiff's case. The dismissal was affirmed unanimously and without opinion in the Appellate Division and leave to appeal was denied in the Appellate Division and in the Court of Appeals. Thereafter, in pursuit of an asserted belief that in the trial professed signatures of John Bower that he had testified were not in fact his were truly his signatures and that certain notarized papers were falsely notarized, plaintiff had taken much action, in the District Attorney's office, in the office of the Secretary of State, and, perhaps, elsewhere, that Bower and his firm aver was harassing beyond any possible privilege of the occasion. They sued, in the action in which

the injunction was made, for redress against the alleged harassment and to enjoin it.

Petitioner's significant claims here are that he has no viable remedy against the temporary injunction because he cannot show that he timely opposed it, and that (in consequence of the injunction) he has to this date been prevented from presenting his motion for a new trial in the case against the securities firm and Bower on the ground that the discovery of the allegedly fraudulent practices came only after the dismissal, so that there has never been a judicial evaluation of his evidence on that point.

The Petitioner asks this Court (1) whether he has not a constitutional right to complain to the Federal Reserve Board of Governors of violations of Regulations U and T by the securities firm and Bower without being in contempt of the preliminary injunction, (2) whether he cannot sue in this Court for violation of his civil rights under 18 U.S.C. §241. (See 42 U.S.C. §§ 1983, 1985(2)), and (3) for a ——— in that the preliminary injunction is ineffective for constitutional reasons.

Injunctions against vexatious litigants are not unknown in the federal courts (*American Optometric Ass'n* v. *Ritholz,* 7th Cir. 1939, 101 F.2d 883), and the power to make such an injunctive order and to enforce it by contempt procedures has been sustained. *Scott* v. *Hunt Oil Co.,* 5th Cir. 1968, 398 F.2d 810. The Court of primary and plenary jurisdiction is the Court to determine whether a basis exists for granting such an injunction, and the terms of any appropriate injunctive order. *Cf. Walston & Co., Inc.* v. *Klein,* N.Y.Co. 1964, 44 Misc. 2d 607, 254 N.Y.S. 2d 734, aff'd. 1st Dept. 1965, 24 App. Div. 2d 559, 260 N.Y.S. 2d 831; *Clinton* v. *United States,* 9th Cir.

1961, 297 F.2d 899; *Meredith* v. *John Deere Plow Co.*, 8th Cir. 1958, 261 F.2d 121.

Since the injunction complained of is not void with face, questions of its breadth and interpretation must be taken up with the Supreme Court, Queens County, in the first instance, and that is true of the present question about presenting a complaint to the Federal Reserve Board. *Cf. Klein* v. *Bower,* 2d Cir. 1970, 421 F.2d 338.

A jurisdiction in extraordinary cases does exist in the federal court to grant relief against the maintenance or pursuit of state court litigation under 42 U.S.C. § 1983, 1985(2). *Cf. Boltons* v. *Lindsley,* 10th Cir. 1948, 170 F.2d 705, 707; *Dinwiddie* v. *Brown,* 5th Cir. 1956, 230 F.2d 465, 469; *Sarelas* v. *Sheehan,* 7th Cir. 1963, 326 F.2d 490, 491-492. But such a jurisdiction is not to be exercised against a court as such (*Zucherman* v. *Appellate Division*, 2d Cir. 1970, 421 F.2d 625), nor, indeed, can any such lie against a judge for acts he performs in the discharge of his office. *Pierson* v. *Ray,* 1967, 386 U.S. 547. If, therefore, a properly framed complaint that was not frivolous and which presented a substantial federal question could be in good faith presented to the federal court as against defendants suable under 42 U.S.C. §§ 1983, 1985 complaining of the injunction and its effect on rights that can invoke constitutional protection; such a filing could not compatibly with the purpose of 42 U.S.C. §§ 1983, 1985 be treated as automatically a contempt of the state court injunction; such a filing could, in the case of a good faith appeal on substantial grounds for redress against what was believed to be a deprivation of civil rights, be analogized to the filing of an appeal. That does not mean, however, that such a federal filing, if properly found to be a part of a course of vexatious litigation the continuance of which have been

enjoined by the State Court, could not ultimately be found to be a direct contempt of the State Court injunction.

It appears, then, that the only proper order to make at this time in the present proceeding in which, strictly, only the state court has been joined, or attempting to be joined, in an order dismissing the matter without prejudice to a proper suit under 42 U.S.C. §§ 1983, 1985 (2) if any such suit can be framed.

It is accordingly

Ordered that the Clerk enter judgment dismissing the petition without prejudice to the filing of an action properly framed under the Civil Rights Acts.

Brooklyn, New York
August 25, 1970

(Illegible)
U.S.D.J.

APPENDIX D

Order on Motion of the United States Court of Appeals

Motion, after hearing, is disposed of as follows:

(a) As to sub-division (a) denied as moot because plaintiff has in fact made the motion and has been heard in oral argument.

(b) As to sub-division (b) denied as unnecessary since, so far as this Court is concerned, plaintiff may appear by counsel if he so desires.

(c) As to sub-division (c) denied as inappropriate relief for this Court to grant, without prejudice to any rights plaintiff may have.

(d) As to sub-division (d) denied on the merits without expressing any opinion as to the merits of the motion said to have been made by defendants.

So Ordered:

Inzer B. Wyatt
U.S.D.J

January 11, 1971

APPENDIX E

Order of the United States Court of Appeals

#6 6/21/71 #71-1445

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of June, one thousand nine hundred and seventy-one.

ERNEST KLEIN,

Plaintiff-Appellant,

v.

JOHN J. BOWER, WILLIAM F. O'CONNOR, JOHN GARDNER, BOWER, O'CONNOR & GARDNER A Partnership, MARY ANN OATES, MARRY ANNA MACUKAS and CAROLYN SCHIFF,

Defendants-Appellees.

It is hereby ordered that upon consideration of the motion made herein by appellant pro-se by notice of motion dated May 27, 1971 to declare that appellant has unrestricted right to retain counsel to represent him in the appeals herein; to declare that counsel so retained cannot be prosecuted for contempt of court; to extend the

time to perfect the appeals and to retain counsel; for leave to argue this motion without being placed in jeopardy or violation of the State Preliminary Injunction Order, that the motion to modify the State Court Injunction be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

Before: HON. HENRY J. FRIENDLY,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges